

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TUAN VAN TRAN,	:	CIVIL ACTION
Petitioner	:	
	:	
v.	:	
	:	
	:	
FRANK GILLIS, et al.	:	
Respondents	:	NO. 98-532

M E M O R A N D U M

Padova, J.

October 19, 1999

Petitioner, Tuan Van Tran, a state prisoner incarcerated at the State Correctional Institute in Coal Township, Pennsylvania, filed a Petition for a Writ of Habeas Corpus ("Petition") pursuant to 28 U.S.C.A. § 2254(a) (West 1999). In accordance with 28 U.S.C. § 636(b)(1)(B) (1994) and Local Rule of Civil Procedure 72.1, this Court by Order dated October 19, 1998, referred the Petition to United States Magistrate Judge Thomas J. Rueter for a Report and Recommendation ("Report").

On May 18, 1999, Magistrate Judge Rueter filed his Report recommending that the Court deny the Petition because all of the claims presented are both procedurally defaulted and without merit. Petitioner filed objections on August 6, 1999; the State filed a response to Petitioner's objections on August 17, 1999.

Having independently reviewed the Report, Petition and the State's response, I adopt the Magistrate Judge's Report insofar as it establishes that Petitioner's claims are procedurally defaulted. For the following reasons, I will overrule

Petitioner's objections and dismiss the Petition.

I. FACTS AND PROCEDURAL HISTORY

On November 7, 1985, a jury convicted Tran of three counts of first degree murder, four counts of robbery, two counts of aggravated assault, and one count each of criminal conspiracy and possession of an instrument of crime. (Information Nos. 1163-76, Nov. Term, 1984.) Tran was later sentenced to three consecutive terms of life imprisonment. (PA. Ct. of Common Pleas Docket at 7.)

The evidence at trial established that Petitioner and his codefendant, Hoan Van Le ("Le"), killed three members of Petitioner's estranged wife's family. At the time of the incident, Tran was a recent immigrant from Vietnam, having entered the United States just two years prior to this incident. He spoke and read very little English and had a limited understanding of the American criminal justice system.

The first main issue that arises in this case is the propriety of the admission of a confession Tran made while being interrogated by the police. During the investigation of the shooting, the police brought Tran to the station for questioning. While under interrogation, Tran made a statement implicating himself as the primary shooter. In this statement, Tran allegedly admitted that he had asked Le for help in killing his estranged wife's brother, who he felt had been blocking his efforts to reconcile with his wife. (Mem. in Support of Pet. at 14-15.) On the night in question, Tran and Le went together to visit Tran's

wife's family. (Id.) Le ordered the entire family into the upstairs bathroom and handed Tran a gun to hold while Le tied up all of the adults. (Id. at 15.) Upon Le's instruction, Tran then pointed the gun at his brother-in-law and shot blindly. (Id.) At some point, Le reloaded the gun and gave it back to Tran, who fired two more times, before returning the gun to Le. (Id.) Le then reloaded and fired the gun several more times, saying that they were not dead yet. (Id.) The account of the events detailed in this statement was inconsistent with Tran's later testimony at trial.

In a pretrial motion, Tran contested the admission of this confession on the grounds that the police used an unqualified interpreter who himself had only a limited comprehension of English. (Id. at 25; Pet'r Objections at 24-26.) Tran alleges that the translator did not accurately translate the Miranda warnings, but rather told Tran that he could have a lawyer only after he made a statement and the lawyer would then straighten everything out. (Pet'r Objections at 28.) For this reason, Tran could not have knowingly or willingly waived his Miranda rights. After a hearing, the trial court denied Tran's suppression motion.

The second important issue in the case involves the joinder of the trial of Tran and his co-defendant Hoan Van Le. Tran claims that his trial was improperly joined with that of Le because their defenses were mutually antagonistic and joinder would completely prejudice their ability to defend themselves.

(Mem. in Support of Pet. at 1-2.) Tran argued that because all of the trial witnesses gave inconsistent accounts of the events, and each co-defendant fingered the other as the primary culprit, their joint trial prevented the jury from making a reliable determination of guilt or innocence. (Pet'r Objections at 16, 22.) In addition, Tran cites as particularly prejudicial the aggressive and flamboyant tactics Le's attorney employed in an effort to incriminate Tran. (Pet'r Objections at 22-24.)

Prior to trial, Tran moved to sever the trials. (Pa. Ct. of Common Pleas Docket at 4.) After a hearing, the trial court denied the motion. (Id.)

On November 14, 1985, Tran's trial counsel, Alexander Hemphill, later replaced by Thomas A. Bergstrom, filed a post-trial motion raising the following issues: (1) the verdict was contrary to the evidence; (2) the verdict was contrary to the weight of the evidence; (3) the verdict was contrary to law; (4) and the defendant was not given the benefit of a reasonable doubt. Commonwealth v. Tran, Nos. 1163-1176, November Session, 1984, 1, 2 (Ct. Com. Pl. Phila. 1984). This motion was denied by the trial court on the merits. Id.

Still represented by Bergstrom, Tran appealed his sentence to the Pennsylvania Superior Court. (Pet. Objections at 2.) This appeal raised only one issue, namely that the trial court erred in denying his motion for severance. (Pet. Objections at 2.) The appellate court affirmed his sentence, holding that the severance issue had been waived by Tran's failure to reassert it

in a post-trial motion as is required by Pa.R.Crim.P. 1123.
Commonwealth v. Tran, No. 00995 Philadelphia 1987 (Pa. Super. Ct. Dec. 15, 1988). Tran did not appeal this decision to the Pennsylvania Supreme Court for review. (Pet. Objections at 2.)

On July 11, 1990, Tran filed a pro se petition for Post Conviction Collateral Relief pursuant to 42 Pa. Const. Stat. Ann. § 9545 et seq. (West 1999) raising the Miranda issue. The court appointed counsel who filed an amended petition raising several claims of ineffective assistance of trial and appellate counsel.¹ After conducting an evidentiary hearing, the court denied the PCRA petition on the merits, holding that because the underlying Miranda claim was frivolous, counsel was not ineffective.

Commonwealth v. Tran, No. 1163-1/2, Nov. 1984 (Ct. Com. Pl. Phila. Jan.22, 1996)(Papalini, J.)

Tran appealed the denial of his petition to the Pennsylvania Superior Court raising five issues: (1) whether the trial court erred in admitting his confession into evidence since it was

¹The amended PCRA petition raised the following claims of ineffective assistance of trial and appellate counsel: (1) counsel failed to object to the lack of competent, independent and qualified interpreters during pre-trial hearings and trial; (2) counsel failed to properly litigate a motion to suppress Tran's statement on the basis that he could not have knowingly and intelligently waived his Miranda rights; (3) counsel failed to present evidence of good character and failed to request such a jury instruction; (4) counsel failed to object to testimony concerning Tran's prior bad acts; (5) counsel failed to request a proper instruction of the standard of proof required for an insanity defense; (6) counsel failed to object to the trial court's allegedly erroneous instruction on diminished capacity; and (7) counsel failed to request the proper instruction for voluntary manslaughter. Commonwealth v. Tran, No. 1163 1/2, November Term 1984 (Pa. Ct. of Common Pleas May 20, 1996).

unknowing and involuntary; (2) whether the trial court erred in admitting his confession because his trial counsel failed to obtain a tape recording of the interrogation; (3) whether the trial court erred in refusing to sever his trial from that of his co-defendant; (4) whether the trial court erred by using unqualified interpreters during his pretrial hearings and trial; and (5) whether the PCRA court erred in holding that his PCRA counsel was not ineffective. (Appeal Br. at 4-5.)

The superior court affirmed the dismissal of his PCRA petition finding that the record supported the suppression court's determination that all Miranda warnings were given and understood. Commonwealth v. Tran, No. 00850 PHL 96 1,5 (Pa. Super. Ct. Dec. 17, 1996). The court held that Tran's claims of ineffective assistance of counsel in failing to obtain the tape recording of his statement or insist that qualified translators be provided were waived because he failed to raise them on direct appeal. Id. at 5-6. Similarly, the court held that it could not address the severance issue on post-conviction relief because it was previously litigated and found to have been waived on direct appeal. Id. at 6. Finally, the court rejected Tran's claim of ineffective assistance of PCRA counsel on the merits. Id. at 4-8.

Tran's present counsel, Elizabeth Ainslie, then filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court. The Petition alleged that: (1) he had been denied due process of law because no state appellate court had conducted a

substantive review of his trial; (2) trial counsel was ineffective for (a) failing to investigate the accuracy of the translation of petitioner's police statement, (b) failing to pursue suppression of the statement on the ground that the police were advised not to interrogate him until counsel was provided, (c) eliciting highly prejudicial testimony from his wife about prior spousal abuse, and (d) failing to pursue the severance issue in a post-trial motion; (3) appellate counsel was ineffective for pursuing only the waived severance claim and failing to ask Tran whether he wished to take a direct appeal to the Pennsylvania Supreme Court; and (4) PCRA counsel was ineffective by failing to obtain a timely evidentiary hearing and effective witness testimony. (Pet. for Allowance of Appeal at 1-2.) On September 23, 1997, the Supreme Court denied Tran's request for allocatur. Commonwealth v. Tran, 704 A.2d 637 (Pa. 1997).

On February 3, 1998, Tran filed the instant petition for habeas corpus. In his pro se filing, Tran alleged that his conviction was obtained through the use of a coerced confession and in violation of his privilege against self-incrimination, and that the prosecution failed to disclose exculpatory evidence. (Pet. at 7-8.) Tran further claimed that his trial counsel was ineffective for failing to: (1) secure a qualified translator for their conferences; (2) secure a qualified translator for the suppression hearing and trial; (3) obtain a severance of his trial from his co-defendant; (4) seek interlocutory review of the

trial court's pretrial denial of severance; (5) and obtain a copy of an audio tape allegedly made during his police interrogation. (Pet. at 8-A.)

This Court appointed counsel, Elizabeth Ainslie, and ordered her to file a memorandum to support Tran's pro se petition. Counsel's memorandum expressly incorporates Tran's petition, but primarily discusses substantively only two claims, namely that the trial court's severance ruling deprived Tran of due process of law, and that the weight of the evidence demonstrates that Tran did not knowingly or voluntarily waive his Miranda rights when confessing to the police.

The State filed a supplemented response to the petition, asserting that the claims raised in counsel's memorandum are procedurally defaulted and hence unreviewable by the Court. On February 17, 1999, an evidentiary hearing on the issue of procedural default was held before Magistrate Judge Rueter.

On August 6, 1999, Tran's counsel filed objections to Judge Rueter's Report conceding that his claims were not exhausted in the state courts, but arguing that cause and prejudice exist for his failure and in the alternative that refusal to address his claims on the merits would result in a fundamental miscarriage of justice.² (Pet. Objections at 16.) Having approved and adopted

²Tran states "[i]t is clear that Tran's counsel, including undersigned counsel, did not present his constitutional claims to the Pennsylvania appellate courts in a form sufficient to qualify as classic exhaustion of state remedies." (Pet'r Objections at 16.)

in part Magistrate Judge Rueter's Report and Recommendation, the Court will discuss Petitioner's Objections below.

II. Standard of Review

Where a habeas petition has been referred to a magistrate judge for a Report and Recommendation, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.... [The Court] may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b) (1994).

The instant Petition was filed pursuant to section 2254 which applies to persons "in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.A. § 2254(a) (West 1999).

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), P.L. 104-132, 110 Stat. 1214, applies to this case.³

³Tran contests the application of the AEDPA to his petition, arguing that the AEDPA was enacted after his trial and after the filing of his first two federal habeas petitions that were dismissed without prejudice. (Pet'r Reply to Commonwealth's Resp. at 4.) Therefore, despite the fact that it was filed after the Act's effective date, the AEDPA should not apply to his current petition.

The Court of Appeals for the Third Circuit has recently reaffirmed its position that despite the dismissal without prejudice of pre-AEDPA habeas petitions, petitions filed after the AEDPA's effective date are nonetheless governed by the Act. Hull v. Kyler, No. 97-7551, 1999 WL 636957, at *11 (3rd Cir. Aug. 23, 1999)(stating "the fact that Hull [the petitioner] filed a prior (since dismissed) petition is irrelevant to such issues as the law that applies to his present petition). In addition, the applicability of the AEDPA amendments to section 2254 has little

The AEDPA made numerous changes to Title 28, Chapter 153 of the United States Code, 28 U.S.C. §§ 2241-2255, the chapter governing federal habeas petitions. Section 2254(d)(1), as amended by AEDPA, provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C.A. § 2254(d)(1) (West 1999). Any determinations of factual issues made by a State court must be presumed correct, unless the applicant provides clear and convincing evidence in rebuttal. 28 U.S.C.A. § 2254(e)(1) (West 1999).

A habeas writ should not be granted "unless the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent." Matteo v. Superintendent SCI Albion, 171 F.3d 877, 890 (3rd Cir. 1999). Federal courts may also consider the decisions of inferior federal courts when evaluating

bearing on the outcome of this case since the law regarding procedurally defaulted claims remains the same before and after the amendments. See Hull, 1999 WL 63657 at *7 (applying settled law regarding procedurally defaulted claims to a habeas corpus petition to which the AEDPA is applicable).

whether the state court's application of the law was reasonable.

Id.

Under Section 2254, a writ of habeas corpus may not be granted unless the applicant has exhausted all remedies available in state court. 28 U.S.C.A. § 2254(b)(1)(A) (West 1999). "The exhaustion requirement ensures that state courts have the first opportunity to review federal constitutional challenges to state convictions and preserves the role of state courts in protecting federally guaranteed rights." Caswell v. Ryan, 953 F.2d 853, 857 (3rd Cir.) cert. denied, 504 U.S. 944 (1992). A petitioner will not be deemed to have exhausted the available state court remedies so long as he has the right under state law to raise the question presented by any available procedure. 28 U.S.C.A. § 2254(c) (West 1999).

To exhaust the remedies available in the state courts, a petitioner must first fairly present to the Pennsylvania courts all the claims that he will make in his habeas corpus petition. Henderson v. Frank, 155 F.3d 159, 164 (3rd Cir. 1998). The petitioner's state court pleadings and briefs must demonstrate that he has presented the legal theory and supporting facts asserted in the federal habeas petition in such a manner that the claims raised in the state courts are "substantially equivalent" to those asserted in federal court. Doctor v. Walters, 96 F.3d 675, 678 (3rd Cir. 1996). However, a petitioner who has raised an issue on direct appeal need not raise it again in state post-conviction proceedings. Evans v. Court of Common Pleas, Delaware

County, Pa., 959 F.2d 1227, 1230 (3rd Cir. 1992).

If state avenues of relief, including post-conviction proceedings, have been exhausted, but the petitioner has failed to raise the alleged grounds for error, the claim is procedurally defaulted and may not be raised in federal court. Coleman v. Thompson, 501 U.S. 722, 729-30, 111 S. Ct. 2546, 2564, 115 L.Ed.2d 640 (1991); Sistrunk v. Vaughn, 96 F.3d 666, 673 (3rd Cir. 1996). Recently, the Supreme Court held that a petitioner procedurally defaults a claim if he fails to raise it in a discretionary state appeal. O'Sullivan v. Boerckel, 119 S. Ct. 1728, 1734 (1999); Hull, 1999 WL 636957, at *7.

Upon a finding of procedural default, review of a federal habeas petition is barred unless the petitioner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or can show that failure to consider the claims will result in a fundamental miscarriage of justice. Coleman, 501 U.S. at 749-50, 111 S. Ct. at 2564-65.

III. DISCUSSION

As Tran concedes, the claims raised in the instant petition were not fully exhausted in the Pennsylvania state courts. Tran's claims are thus procedurally barred because of the one-year statute of limitations period for the filing of state post-conviction relief petitions, 42 Pa. Cons. Stat. Ann. § 9545(b)(1) (West 1999), and the statutory restriction of post-conviction relief to issues not raisable at trial or on direct appeal, 42 Pa. Cons. Stat. Ann. §§ 9543(a)(3), 9544 (West 1999). See

Commonwealth v. Peterkin, 554 Pa. 547, 558, 722 A.2d 638, 643 (1998)(upholding the constitutionality of the statute of limitations period requiring petitions to be filed within one year of the date the judgment becomes final). Therefore, Tran must fulfill the Coleman requirements of cause for the default and actual prejudice, or demonstrate that this Court's failure to consider his claims would cause a fundamental miscarriage of justice.

A. Cause and Prejudice

Tran asserts that ineffective assistance of his trial and appellate counsel and death of his trial counsel provide sufficient cause for his failure to raise his claims in the state court. The Court finds these arguments to be without merit.

To demonstrate cause for the default, the petitioner must show that some objective factor external to the defense impeded or prevented his ability to comply with state procedural rules. Caswell v. Ryan, 953 F.2d 853, 862 (3rd Cir.), cert. denied, 504 U.S. 944, 112 S. Ct. 2283, 119 L.Ed.2d 208 (1992). Ineffective assistance of counsel may constitute cause for procedural defaults only if the claim of ineffective assistance was presented to the state courts independently prior to its use to establish cause. Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645, 91 L.Ed.2d 397 (1986).

A review of the record reveals that although a variant of his claim of ineffective assistance of counsel was presented on appeal, the Pennsylvania Superior Court found that the claim had

been waived and was therefore unreviewable. Therefore, this claim has not been exhausted in the state courts, and cannot constitute cause for his procedural defaults.

The death of his initial appellate counsel, Alexander Hemphill, also cannot constitute cause for his procedural defaults. Prior to his death, Hemphill had filed a Motion for New Trial And/Or Arrest of Judgment which was ruled upon by the superior court. Tran was then appointed Bergstrom as counsel for his sentencing and direct appeal.

Although the death of his initial counsel is unfortunate, the Court does not see how it could have impeded Tran's ability to comply with the state procedural rules since a post-trial motion was filed by Hemphill before he died. In addition, Tran was promptly appointed new counsel who filed another post-trial motion and was present at his sentencing.

Therefore, the Court finds that Petitioner has not alleged sufficient cause for his procedural defaults. Because no cause has been demonstrated, the Court need not address the prejudice requirement.

B. ACTUAL INNOCENCE

In his objections, Tran also asserts that this Court's failure to review his claims on the merits would result in a fundamental miscarriage of justice. (Pet'r Objections at 16.) The Court rejects this argument.

Even where no cause or prejudice can be shown, a federal court may grant a writ of habeas corpus where failure to hear the

claim would result in a miscarriage of justice. Sawyer v. Whitley, 505 U.S. 333, 339, 112 S. Ct. 2514, 2518, 120 L.Ed.2d 269 (1992). A fundamental miscarriage of justice occurs when a constitutional violation has probably resulted in the conviction of one who is actually innocent. Murray, 477 U.S. at 495, 106 S. Ct. at 2649; Hull v. Freeman, 991 F.2d 86, 91 n.3 (3rd Cir. 1993).

To meet this standard, the prisoner must show a fair probability that, in light of all the evidence, including that claimed to have been illegally admitted and that claimed to have been wrongly excluded or became available only after trial, the trier of fact would have entertained a reasonable doubt of his guilt. Sawyer, 505 U.S. at 339 n.5, 112 S.Ct. at 2519 n.5 (citing Kuhlmann v. Wilson, 477 U.S. 436, 454 n. 17, 106 S. Ct. 2616, 2627 n.17, 91 L.Ed.2d 369 (1986)). This exception is exceedingly narrow. "To be credible, a claim of actual innocence must be based on reliable evidence not presented at trial." Calderon v. Thompson, 118 S. Ct. 1489, 1502-3 (1998)(internal citations and quotations omitted).

Tran argues that this requirement of new evidence not presented at trial to prove actual innocence does not apply to him because the case in which that proposition was established, Schlup v. Delo, 513 U.S. 298, 115 S. Ct. 851 (1995), dealt with a successive habeas corpus petition. Rather, Tran asserts that I may consider the merits if I believe that his is generally a fundamentally unjust incarceration.

However, even if Tran is correct in asserting that no new evidence of actual innocence is required in his case, he has not put forth any evidence that would allow the Court to conclude that a fair probability exists that the trier of fact would have entertained a reasonable doubt of his guilt. Counsel devotes a large portion of the submitted objections to parsing the evidence presented at trial and highlighting the alleged internal inconsistencies of the witness testimony in an effort to show that Tran's testimony is more credible than that of Le or the eyewitnesses. (See Pet'r Objections at 7-16.) However, the case, even when thus viewed, essentially comes down to a narrow credibility contest between Tran, Le and the eyewitnesses. Despite the alleged inconsistencies in the testimony of the various witnesses, a jury would be perfectly within its rights to credit the testimony of one witness or co-defendant and disbelieve the other. Without some additional evidence tending to more conclusively show Tran's actual innocence, the Court cannot conclude that a fair probability exists that a trier of fact would have entertained a reasonable doubt as to Tran's guilt. Therefore Tran has not met his burden of establishing a fundamental miscarriage of justice.

V. CONCLUSION

For the reasons explained above, this Court overrules Petitioner's objections and finds that he has neither established cause and prejudice nor a fundamental miscarriage of justice sufficient to allow this Court to review the merits of his

petition. Since Tran's claims are procedurally defaulted, this Court must dismiss the petition.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TUAN VAN TRAN,	:	CIVIL ACTION
Petitioner	:	
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v.	:	
	:	
	:	
FRANK GILLIS, et al.	:	
Respondents	:	NO. 98-532

O R D E R

AND NOW, this day of October 1999, upon careful and independent consideration of the Petition for a Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 (Doc. No. 1), Respondent's Answer and Memorandum of Law to Petition for Writ of Habeas Corpus (Doc. No. 15), Petitioner's Reply thereto, and Respondent's Supplemental Answer to Petition for Writ of Habeas

Corpus (Doc. No. 21), and after review of the Report and Recommendation of United States Magistrate Judge Thomas J. Rueter (Doc. No. 30), and consideration of Petitioner's objections to the Report and Recommendation (Doc. No. 36), and consideration of Respondent's Answer to Petitioner's objections (Doc. No. 37), and for the reasons set forth in the accompanying memorandum, **IT IS HEREBY ORDERED** that:

1. Petitioner's objections are **OVERRULED**;
2. The Report and Recommendation of Judge Thomas J. Rueter is **APPROVED** and **ADOPTED** in part;
3. The Petition for a Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 is **DISMISSED**;
4. Since the Petitioner has failed make a substantial showing of the denial of a constitutional right, the Court declines to issue a certificate of appealability under 28 U.S.C. § 2253(c)(2); and
5. The Clerk shall **CLOSE** this case statistically.

BY THE COURT:

John R. Padova, J.